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No. 93-1583

In The

Supreme Court of the United States

October Term, 1993

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

vs.

STANLEY M. GROSSMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals have jurisdiction under the collateral order doctrine over an appeal from an interlocutory district court decision reinstating under section 27A of the Securities Exchange Act a conditionally dismissed securities class action after determining it had been timely commenced within the applicable limitations period?

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STATUTORY PROVISIONS INVOLVED

Securities Exchange Act section 27A, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991), codified at 15 U.S.C. § 78aa-1 (Supp. III 1991), provides:

> (a) Effect on pending causes of action
>
> The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on dismissed causes of action
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

The entire text of 28 U.S.C. § 1291 (Supp. IV 1992) is:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Following the release by the Securities and Exchange Commission (the "SEC") on August 17, 1987 of an opinion and order finding that petitioner Texas Commerce Bancshares, Inc. ("TCB") had violated section 13(a) of the Securities Exchange Act[1] by materially understating its loan loss reserve during the first quarter of 1985, respondent commenced this securities class action asserting violations of section 10(b) of the Securities Exchange Act,[2] and rule 10b-5 promulgated thereunder.[3] Taking advantage of doctrinal developments regarding the appropriate limitations period to apply to § 10(b) actions, foreshadowed by this Court's *Malley-Duff* opinion in June 1987,[4] petitioner has delayed for

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1. 15 U.S.C. § 78m(a) (1988).

2. 15 U.S.C. § 78j(b) (1988).

3. 17 C.F.R. § 240.10b-5 (1993).

4. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987).

almost seven years, and by this petition seeks to delay further, substantive consideration and determination of this securities class action. TCB's petition raises no special or important issue worthy of this Court's review and seeks merely to prolong consideration of what would be a meritless interlocutory appeal.

A. Plaintiff Commences This Action In August 1987 After The SEC Found TCB Had Violated § 13(a).

As the district court found, plaintiff considered bringing this action in 1985 when the possibility that TCB had misrepresented its financial condition was first disclosed. (Pet. App.[5] 17a.) However, plaintiff, in an exercise of caution and relying on the then-existing six-year limitations period applied to § 10(b) securities actions commenced in New York (Pet. App. 13a, 14a, 17a), did not file his complaint until shortly after the SEC issued its August 1987 opinion and order. In its opinion and order, the SEC found that TCB had violated Securities Exchange Act § 13(a) by filing a report on Form 10-K for the period ending December 31, 1984, "which contained financial statements which materially understated the ALLL [the allowance for loan and lease losses] by $28.2 million and overstated the earnings and Net Income Before [Taxes by 12%] and After Taxes [by 8%] for the year." The SEC did not obtain evidence of *scienter,* because that is not a requirement to show a violation of § 13(a).

B. TCB Delays Its Day Of Reckoning.

TCB's response to the complaint was to file motions to dismiss for untimeliness and improper venue. Plaintiff moved for certification of the class. Discovery was taken confined to the

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5. "Pet. App." refers to the appendix filed with TCB's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("TCB's Petition").

issues on these motions, and, following the Third Circuit's decision in *In re Data Access Sys. Sec. Litig.*,[6] the parties and the district court restricted the initial motion practice (heard in late 1988) to the limitations issue. The district court reserved decision and then placed the case on its suspense calendar while awaiting doctrinal developments.

C. The Limitations Period Applicable To § 10(b) Actions Is Significantly Changed.

On November 8, 1990, the Court of Appeals for the Second Circuit in *Ceres Partners v. GELAssociates*[7] determined that there should be a uniform limitations period for § 10(b) actions requiring suit to be filed within one year from the date of discovery and not more than three years from accrual of the claim. However, on April 30, 1991, in *Welch v. Cadre Capital*,[8] the Second Circuit held that the new *Ceres Partners* limitations period would not be applied retroactively under this Court's standards established in *Chevron Oil Co. v. Huson*.[9] This Court on June 20, 1991, then decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[10] and *James B. Beam Distilling Co. v. Georgia*.[11] *Lampf Pleva* adopted the one-year/three-year uniform limitations period for § 10(b)

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6. 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988).

7. 918 F.2d 349, 352-53 (2d Cir. 1990).

8. 923 F.2d 989, 995 (2d Cir.) ("*Welch I*"), *vacated and remanded sub nom. Northwest Sav. Bank PaSA v. Welch*, 501 U.S. __, 111 S. Ct. 2882, *opinion after remand*, 946 F.2d 185 (2d Cir. 1991).

9. 404 U.S. 97, 106-107 (1971).

10. 501 U.S. 350, __, 111 S. Ct. 2773, 2781 (1991).

11. 501 U.S. 529, __, 111 S. Ct. 2439, 2448 (1991).

actions, and *James Beam* held that new rules announced by this Court should be applied to all pending cases. In addition, this Court remanded *Welch* to the Second Circuit for reconsideration in light of its decisions in *Lampf Pleva* and *James Beam.*[12]

D. The District Court Enters An Order Conditionally Dismissing This Case.

On September 20, 1991, the district court signed an order (Pet. App. 2a-4a) conditionally dismissing this action, pending the outcome of the remand of *Welch.* However, as conceded by TCB's Petition at 6 in n. 3, no judgment or final order was ever entered! Therefore, under long-standing Second Circuit law,[13] this conditional order was not appealable.[14]

E. Congress Enacts § 27A And Plaintiff Seeks Reinstatement.

On December 19, 1991, Congress enacted Securities Exchange Act § 27A. In pertinent part, § 27A provides that implied

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12. 501 U.S. __, 111 S. Ct. 2882 (1991).

13. *Johann Maria Farina Gegenuber dem Neumarkt v. Roger & Gallet,* 296 F.2d 119 (2d Cir. 1961) (Friendly, Marshall and Clark, CJJ. *per curiam*) (appeal dismissed as premature from conditional order where no final judgment was entered); *cf. Bankers Trust Co. v. Mallis,* 435 U.S. 381, 382 (1978) (appeal permitted from unconditional final order where parties and court proceeded on the assumption that there was an adjudication of dismissal), relied on in TCB's Petition at 6, n. 3, and 12, n. 4.

14. The unappealability of the conditional September 20 order places this case on all fours with *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 84 (2d Cir. 1993), and creates a crucial distinction with *Pacific Mut. Life Ins. Co. v. First Republic Bank Corp.,* 997 F.2d 39, 46 (5th Cir.), *cert. granted sub nom. Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.,* 114 S. Ct. 680 (1993) ("[e]ach of the defendants in these cases . . . possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims").

actions under § 10(b) — which had been dismissed as time-barred after June 19, 1991 (such as this action), but which would have been considered timely filed "under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such existed on June 19, 1991" — could be reinstated on a motion filed within 60 days. Plaintiff filed such a motion on February 14, 1992.

TCB opposed the motion, arguing, among other things, that § 27A was unconstitutional. The district court again delayed decision until the issue was clarified by the Second Circuit. On September 27, 1993, the Second Circuit decided *Axel Johnson, Inc. v. Arthur Andersen & Co.*[15] The Second Circuit upheld the constitutionality of § 27A(a) in the face of a "separation of powers" challenge,[16] and rejected a "vested rights" challenge to section 27A(b) because, as here, the time for appeal of the district court's decision, there denominated an order, had not begun to run.[17] The Second Circuit reasoned:

> [N]ot all judgments that are final for purposes of *res judicata* are final for Fifth Amendment and separation of powers purposes. Rather, a case remains "pending," and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse.[18]

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15. 6 F.3d 78 (2d Cir. 1993).

16. 6 F.3d at 81-83.

17. 6 F.3d at 83-84.

18. 6 F.3d at 84 (citations omitted). *Cf.* TCB's Petition at 12, n. 4.

F. The District Court Reinstates This Action.

After the Second Circuit's decision in *Axel Johnson*, the district court on December 22, 1993 issued its opinion and order reinstating this action. The court followed the Second Circuit's determination on the constitutionality of § 27A (Pet. App. 9a-10a) and then applied Second Circuit limitations and retroactivity principles as they existed on June 19, 1991, which had been stated in *Welch I* (Pet. App. 10a-12a). In particular, the district court found that (i) *Ceres Partners* had established a new principle of law (Pet. App. 12a-13a), (ii) retrospective application of *Ceres Partners* would not further the effective operation of the new rule it stated (Pet. App. 13a-14a), and (iii) the specific equities in this case weighed in favor of permitting plaintiff to proceed (Pet. App. 14a-17a).[19]

G. The Court Of Appeals Dismisses TCB's Attempted Appeal.

Pursuing its strategy of delay, TCB sought to appeal under the collateral order doctrine, first enunciated in *Cohen v. Beneficial Indus. Loan Corp.*,[20] the district court's interlocutory determination reinstating this conditionally dismissed action. On respondent's motion, the court of appeals summarily dismissed the attempted appeal (Pet. App. 1a). TCB now seeks certiorari from this Court.

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19. TCB's Petition is significantly inaccurate at 6, n. 3, where it claims that the district court did not weigh the equities as required by *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971), and, in particular, did not consider whatever equities there were in TCB's favor from its purportedly having contributed to the development of a new rule of law (*see* Pet. App. 16a where the district court rejected this very argument).

20. 337 U.S. 541, 546-47 (1949).

SUMMARY OF THE ARGUMENT

There is no special and important issue presented by petitioner.

• Section 27A affects only a limited number of cases, *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 82 (2d Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1572 (9th Cir. 1993), and the number of those cases must diminish as the last date to reinstate a case under § 27A — February 17, 1992 — recedes.

• There is no conflict among the circuits, as there is no reported decision on the applicability of the collateral order doctrine to an interlocutory decision reinstating a § 10(b) action under § 27A.[21]

• The collateral order doctrine is inapplicable. Section 27A only modified a limitations period; it does not contain "an explicit statutory or constitutional guarantee that trial will not occur," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). The validity of TCB's limitations defense to this action may be reviewed on appeal from any final judgment in favor of respondent. *See Board of Regents of Univ. of State of New York v. Tomanio*, 446 U.S. 478, 482-83 (1980) (upholding a limitations defense to reverse a judgment for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Koester v. American Republic Inv., Inc.*, 11 F.3d 818, 820 (8th Cir. 1993) (reversing a judgment on a verdict against one defendant because the breach of fiduciary duty claim was time-barred); *DeWeerth v. Baldinger*, 836 F.2d 103, 104 (2d Cir. 1987) (reversing a judgment directing recovery of a stolen painting because the claim was time-barred).

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21. For example, the appeal in *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993), was certified under 28 U.S.C. § 1292(b), and the three appeals in *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993), were all from final judgments.

REASONS FOR DENYING THE WRIT

THE COLLATERAL ORDER DOCTRINE DOES NOT PERMIT TCB'S APPEAL FROM THE DISTRICT COURT'S DETERMINATION.

To come within the "narrow exception to the normal application of the final judgment rule [that] has come to be known as the collateral order doctrine," *Midland Asphalt, supra*, 489 U.S. at 798, an "order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The third condition cannot be met by petitioner.[22]

A. The District's Court's Determination Of The Constitutionality Of § 27A And Of The Applicable Limitations Period May Be Reviewed After Final Judgment.

The district court's opinion and order that TCB seeks to appeal decided two issues — (1) the constitutionality of § 27A and (2) the appropriate limitations period to be applied to this action. Neither issue can possibly justify an interlocutory appeal.

If this Court in the pending *Morgan Stanley* case[23] should

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22. Contrary to TCB's Petition at 3, respondent did not concede in the court of appeals that TCB had satisfied the first two conditions of the collateral order doctrine. Respondent noted that the court of appeals need not have addressed those conditions because the third condition was dispositive, but respondent also presented arguments relating to the first two conditions.

23. *Pacific Mut. Life Ins. Co. v. First Republic Bank Corp.*, 997 F.2d 39, 46 (5th Cir.), *cert. granted sub nom. Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 114 S. Ct. 680 (1993).

determine that § 27A(a) is unconstitutional, then surely the district court, following *James Beam, supra*, will apply the new law.[24] If this Court should uphold the constitutionality of § 27A, then surely TCB would be well advised not to pursue a then frivolous appeal of this issue. In either event, the constitutionality of § 27A may be raised by TCB on any appeal from a final judgment in favor of plaintiff. *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (plaintiff's Equal Protection challenge to jury selection reviewed on appeal from a final judgment for defendant); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987) (defendant's First Amendment challenge to statute reviewed on appeal from final judgment for plaintiff).

Similarly, the issue of the appropriate limitations period applicable to this specific action is reviewable on appeal from a final judgment, *Board of Regents of Univ. of State of New York v. Tomanio*, 446 U.S. 478, 482-83 (1980); *Koester v. American Republic Inv., Inc.*, 11 F.3d 818, 820 (8th Cir. 1993); *DeWeerth v. Baldinger*, 836 F.2d 103, 104 (2d Cir. 1987), as would be any other defense that fails during the course of an action, *Woods v. Rhodes*, 994 F.2d 494, 496 (5th Cir. 1993) (defense of release); *Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 231 (5th Cir. 1986) (statute of frauds defense).[25]

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24. To this extent, the district court did not conclusively determine the disputed question, and the first *Coopers & Lybrand* condition has not been met. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (order denying stay during pendency of state court action "inherently tentative"); *cf. id.*, at 291 (Scalia, J., concurring: "A categorical order *otherwise qualifying* for *Cohen* treatment does not necessarily lose that status, and become 'nonfinal,' merely because the court may contemplate — or even, for that matter, invite — renewal of the aggrieved party's request for relief at a later date" [emphasis added]).

25. A limitations defense, as any other affirmative defense that must be (Cont'd)

B. TCB Is "Playing Word Games" In Attempting To Contrive A Right Justifying An Interlocutory Appeal.

Nowhere in the district court opinion is there a determination of TCB's "right not to undergo any further litigation" (TCB's Petition at 3) or "right not to stand trial" (TCB's Petition at 8) or "right to avoid trial" (TCB's Petition at 9),[26] because no such right was ever in issue or adjudicated. Nowhere is such a right granted in § 27A, which only speaks about "limitation periods" and "principles of retroactivity" in regard to § 10(b) actions. The inescapable conclusion is that TCB is "play[ing] word games with the concept of a 'right not to be tried.' " *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989).

TCB seeks to create a rationale justifying appeal (where none exists) by recasting the events in the district court as implicating the *res judicata* effect of the district court's conditional order of September 20, 1991 (which order could not have been[27] and is not the subject of this or any other appeal) and as somehow falling within, while still being distinguishable from, the line of cases that is under review by this Court in *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir.), *cert. granted*, 114 S. Ct. 379 (1993). These verbal gymnastics do not avail petitioner.

For all the wondrous praises of *res judicata* in TCB's Petition at 12-14, it is still, pedestrianly, only a defense of claim or issue

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(Cont'd)
pleaded under Fed. R. Civ. P. 8(c), should not be considered "completely separate from the merits." To this extent the second *Coopers & Lybrand* condition is not satisfied.

26. TCB's different formulations of its purported right indicate how slippery the notion is.

27. *See* n. 13 above.

preclusion in a subsequent action. *Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350[28] (1971); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1[29] (1984); Fed. R. Civ. P. 8(c). As such, it, like other affirmative defenses raised during the course of an action, is reviewable on an appeal at the end of the case. *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 285-87 (1984) (preclusive effect of prior arbitral decision reviewed after verdict for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Board of Regents of Univ. of State*

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28. *Res judicata* and collateral estoppel are affirmative defenses that must be pleaded. Fed.Rules Civ.Proc. 8(c). The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate.

Id.

29. The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim

(Cont'd)

of New York v. Tomanio, 446 U.S. 478, 482-83 (1980) (limitations defense reviewed after judgment for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Woods v. Rhodes*, 994 F.2d 494, 496 (5th Cir. 1993) (denial of summary judgment based on defense of release reviewed after verdict for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 231 (5th Cir. 1986) (statute of frauds defense raised in answer and motion for a directed verdict reviewed after verdict for plaintiff on a breach of contract claim). Thus, a denial of claim or issue preclusion (even if the district court's December 22 order could conceivably be so mischaracterized) does not provide a ground for invoking the collateral order doctrine permitting interlocutory appeals.

Nor does *Desktop* require that this Court grant certiorari in this case. TCB's Petition itself at 8-9 distinguishes *Desktop* and at 15 distinguishes *Janneh v. GAF*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990), the case on which it relied below. Consequently, TCB fatally undercuts its argument that, because *Desktop* is pending for decision in this Court, its petition for certiorari purportedly raising similar issues should be granted. In fact, neither *Desktop* nor *Janneh*, which at most involve the rescission or enforcement of settlement agreements, are related in any way to a determination under Securities Exchange Act § 27A of the appropriate limitations period to be applied in reinstating a conditionally dismissed action. Neither case supports the verbal alchemy used by petitioner to transmute a decision on the limitations period applicable in this action into a determination of "a right not to undergo any further litigation."

(Cont'd)

preclusion therefore encompasses the law of merger and bar. See *id.*, Introductory Note before § 24.

Id.

> The critical question, following *Mitchell* [*v. Forsyth*, 472 U.S. 511 (1985)], is whether "the essence" of the claimed right is a right not to stand trial. This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.

Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988) (citations omitted). TCB is no different from any other defendant whose affirmative defense has been rejected on a motion to dismiss. The "essence" of a limitations defense is not "a right not to undergo any further litigation." TCB has no right to an immediate interlocutory appeal in this case.

CONCLUSION

For all the reasons stated above, this Court should deny TCB's petition for a writ of certiorari.

Respectfully submitted,

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